

Judge's Credibility Decisions Will Not be Reversed on Appeal Absent of Use of Discretion But Independent Fact Finding by the Judge is Not Appropriate

In *Moran v Cosmetic Essence*, the Judge of Compensation found that the employee sustained a compensable injury on January 28, 2016. The Judge found the employee credible and rejected a number of fact witnesses who testified on behalf of the employer (case decided March 14, 2018; Docket A-2588-16T1). In this case, the respondent vigorously contested whether the employee sustained a low back injury while lifting a heavy box on January 28, 2016. The employee admitted he did not provide notice on the date of injury nor the following day since this was a scheduled day off. However, he states on the following day he was scheduled to work, Monday, February 1st, he texted his team leader that he would be unable to come into work as a result of back pain. This was apparently a method of communication that the employee had used over his 20 years of employment since the employee's English was limited and the operation's manager did not speak Spanish. The evidence made clear that the employee did not state in the text that the back complaints were work related.

When the employee eventually came into work on February 11th and met with the plant manager he was terminated for absenteeism. The employee attempted to explain that he informed his supervisor of his inability to work by text and left voicemails. Despite the factual disputes, the Judge of Compensation found that the employee provided notice of an injury in a timely fashion (required within 90 days) and rejected the credibility of the employer's witnesses. The Appellate Division affirmed, noting that the Judge's credibility decisions could reasonably have been reached on sufficient credible evidence presented in the record. They were not going to re-visit the issue of credibility of the fact witnesses. They made it clear that if the employer felt that the employee should be terminated that was a separate decision, but was distinct from the issue of whether the employee sustained a compensable injury. In doing so, the Court also rejected the employer's argument that a doctor's note, without further explanation or testimony, indicating the employee's back pain may have been due to shoveling snow during a snow storm was rejected as insufficient evidence to dispute the employee's testimony.

Interestingly, the Court remanded the matter since the trial was held solely on the issue of whether the employee sustained injuries during the course and scope of employment. Despite the limited nature of the trial issue, the Judge proceeded to award temporary total disability benefits. In fact, the Judge contacted the Division of Temporary Disability and determined that there was a State Disability Lien, doing so all on her own. The Appellate Division remanded the matter stating that the Judge of Compensation is not permitted to conduct this type of investigation outside of the purview of the parties. The case was remanded for further decision with respect to the entitlement to benefits but the underlying finding of compensability was affirmed.

Comment: This case once again confirms the fact that the Judge of Compensation is the ultimate arbiter of credibility. The employer in this case presented a number of fact witnesses testifying that the employee's notice of injury was only initially advising that he would be out of work due to back pain. Despite a medical note that appeared to undercut the employee's allegations of the back pain being due to a work related event versus shoveling snow at home, the Judge found the employee's testimony more credible than the evidence presented by the employer. The Appellate Division will not reverse a Judge's decision if there is sufficient credible evidence to support it, even if there is factual evidence contesting it.

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